

No. 15,996 ✓

IN THE
United States Court of Appeals
For the Ninth Circuit

LEE HON LUNG,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of
State of the United States of
America,

Appellee.

On Appeal from the United States District Court
for the District of Hawaii
in Civil No. 1554.

APPELLEE'S ANSWERING BRIEF.

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APPELLEE'S ANSWERING BRIEF.

JURISDICTIONAL STATEMENT.

Appellee agrees with the jurisdictional statement of Appellant except that the jurisdiction of this Court rests on 28 USC 1291 and 1294(1).

STATUTES INVOLVED.

There is no statute involved other than §360(a), Immigration and Nationality Act of 1952 (8 USC 1503).

STATEMENT OF FACTS.

Appellee disagrees with Appellant's statement of facts and consequently sets forth his own.

Appellant claims birth in Honolulu, Hawaii, on April 4, 1899 (R. 56, Tr. 3). He claims that his parents are Lee Leong Hou and Lee Leong Shee (R. 56, Tr. 3). He claims to have one brother, Lee Hon Fong, now deceased (R. 56-57, Tr. 3-4). He claims further that he returned to China in 1899 when he was seven months old (R. 57, Tr. 4). Appellant claims he returned to Honolulu in 1923 (R. 57, Tr. 4). Appellee admits Appellant arrived in Honolulu in 1923 and was admitted by a Board of Special Inquiry as a citizen of the United States (R. 9-10), see also (R. 57-59, Tr. 4-6), plaintiff's Exhibit A.

At that time two witnesses, as well as Appellant, testified that he was born in Honolulu. None of them purported to be eyewitnesses to his birth, or to have specific knowledge of his birth (Pl.'s Ex. A). There was submitted to the Court attached to an affidavit, a record of Board of Special Inquiry hearing on Lee Hon Fong, alleged brother of Appellant, taken August 6, 1923 (R. 29-35). Witness Lee Chong testified (R. 31) and witness Lee Koon Chong testified (R. 32). As to the Appellant, their testimony was of the same character as that given in his hearing. They did not claim to be eyewitnesses to his birth (R. 31-32), nor did they claim to have specific knowledge concerning his birth. Their testimony amounts to the rankest sort of hearsay.

Appellant testified that he left Hawaii in 1899 (R. 57, Tr. 4) on the Hong Kong Maru on November 8 (R. 65, Tr. 12). He would not positively identify defendant's Exhibit No. 1 (R. 67-69, Tr. 14-16).

He was not able to identify the pictures on defendant's Exhibits Nos. 2 and 3 (R. 71, Tr. 18), nor the pictures attached to defendant's Exhibits Nos. 4 and 5 (R. 72, Tr. 19). He denied that the pictures depicted his mother and father (R. 72, Tr. 19). He further testified that the person who left on the Hong Kong Maru on November 8, 1899 for China was his father under the name of Leong How (R. 75, Tr. 22; R. 76-77, Tr. 23-24) and that the person who left on the Hong Kong Maru on November 8, 1899 as Mrs. Leong How was his mother (R. 75, Tr. 22). He testified he was the younger of the two brothers who went back on the Hong Kong Maru on November 8, 1899 (R. 76, Tr. 23) and that he was one of the two children of Leong How who left at that time (R. 77, Tr. 24). He also stated the two children were brothers (R. 77, Tr. 24). That his older brother left with him on the Hong Kong Maru on November 8, 1899 (R. 78, Tr. 25). He stated he presented a departure record—from the Archives of Hawaii, to the Immigration Service in 1936 when he applied for a Certificate of Citizenship—Hawaiian Islands (R. 66, Tr. 13; R. 81, Tr. 28; R. 82, Tr. 29). He testified that he claimed the departure record entries on the manifests of the SS Hong Kong Maru leaving the Hawaiian Islands on November 8, 1899 of Leong How, Mrs. Leong How, child and infant (R. 83, Tr. 30; R. 85,

Tr. 32). He denied that he used the name Leong Hang Yau (R. 84, Tr. 31). He stated that he did not know whether Leong Hang Wah and Leong Hang Yau left on the Hong Kong Maru on November 8, 1899 as the child and infant of Mr. and Mrs. Leong How. (R. 84, Tr. 31), although the Appellant steadfastly claims that that departure record relates to him (R. 85, Tr. 32; R. 83, Tr. 30).

He further testified that his father and mother lived with him in China until his return in 1923 (R. 70-71, Tr. 17-18). He further testified his mother and father never returned to Hawaii (R. 71, Tr. 18).

Appellant testified that he applied for a passport which was denied. (R. 60-64, Tr. 7-11; see also plaintiff's Exhibit No. 2 admitted in evidence, (R. 62, Tr. 9).)

As to Appellant's credibility, the following statements as to his discussions concerning this case should be noted: (R. 78, 79, Tr. 25, 26; R. 87-88, Tr. 34-35).

DOCUMENTARY EVIDENCE.

Plaintiff's "A"—Plaintiff's Exhibit "A" shows some very interesting characteristics. First of all, not one witness, other than the Appellant (applicant then) testified as to any particulars concerning his birth. Not one of them held themselves out to be eye-witnesses to the birth. See page 3 of the hearing. It is also interesting to note that three witnesses' testimony is contained on one page.

Consequently, the *prima facie* case, if indeed there be one, rests on the rankest kind of hearsay.

The same can be said for the hearing found attached to Affidavit of Charles B. Dwight III, furnished in conjunction with the motion for new trial which was denied by the trial court (R. 39, 41).

It is to be noted further that Appellant's testimony covers exactly one and one-fourth pages.

The questions of interest to this inquiry are found on page 2 of Appellant's testimony (Plaintiff's Exhibit "A"):

Q. Your parents living?

A. Yes.

Q. Names and ages?

A. Father Lee Leong How, alias Lee Choy Ngit, 55; mother Leong She, 45.

* * * * *

Q. What kind of feet has your mother?

A. Natural feet.

* * * * *

Q. What did your father do in Hawaii?

A. I do not know.

Q. When did you go to China?

A. K.S. 25, when I was 4 or 5 months old, on the Hong Kong Maru.

Q. Who went with you?

A. My parents and brother.

(K.S. 25 converted to Gregorian calendar is 1899.)

He states that he left with his parents and his brother, and that his parents' names were Lee Leong How and Leong She—names and family makeup which coincide

exactly with the departure record which Appellant attempts to repudiate.

Defendant's Exhibit No. 1—Departure record taken from file of one Lee Hon Lung—Appellant was skittish concerning this document. He would not positively identify it (R. 67-69, Tr. 14-15), although he steadfastly claims the departure record set out in this exhibit (R. 83, Tr. 30; R. 85, Tr. 32); and that he took a departure record from the Archives of Hawaii to the Immigration Service in 1936 (R. 66, Tr. 13; R. 81, Tr. 28; R. 82, Tr. 29). However, the document is (1) a certificate from the Archives of Hawaii, (2) it bears the date July 22, 1936, (3) and it contains the departure record claimed by Appellant at the trial. It also coincides with the entries on the manifest. Exhibit 6 (pages 3 and 4), which he claimed at the trial (R. 83, Tr. 30; R. 85, Tr. 32).

Defendant's Exhibits Nos. 2, 3, and 7—Defendant's Exhibits Nos. 2 and 3 are affidavits of Chinese laborers. These affidavits served the same purpose as reentry permits do today. Chinese laborers secured these to facilitate reentry into the United States (R. 107-108, Tr. 54-55).

The two affidavits are for Leong How and Mrs. Leong How, the same names as appear on the manifest, Exhibit No. 6, and in the Chinese laborers permit book (Exhibit No. 7). The numbers of the affidavits, No. 10446 and No. 10447, coincide with the numbers in the permit book (Exhibit No. 7). Further, the permit book (Exhibit No. 7) shows in the departure

column the departure date of November 8, 1899, Hong Kong Maru (R. 107, Tr. 54). Since the numbers tie up the permit book and the permit book (Exhibit No. 7) with the date of departure and the manifest, the inescapable conclusion is that Mr. and Mrs. Leong How, as pictured in the laborers' affidavits, are the rightful owners of the departure record claimed by Appellant.

This fact has also become painfully true to Appellant, hence the great effort to pass off this claim of the departure record as a big mistake.

What has happened to the Appellant is not "all a big mistake." He has merely been caught up in his pattern of fraud. In connection with this, the testimony of the Appellant is called to the attention of the Court concerning the photographs of Mr. and Mrs. Leong How (R. 71, Tr. 18; Tr. 2, 3) and the claim that those persons are his parents (R. 75, Tr. 22; R. 76-77, Tr. 23-24). It is quite apparent that one does not fit with the other.

Defendant's Exhibits Nos. 4 and 5—These two exhibits, namely, the Certificate of Residence (Exhibit No. 4), and the Form 432 (Exhibit No. 5), concern the subject of Exhibit No. 3. The similarity of photographs and of the identifying data relate them definitely to the same person and, more importantly, to the departure record claimed by the Appellant. Appellant is unable to identify these photographs as those of his father since, really, these photographs are not of his father, but only of a person claimed by him

for the fraudulent purpose of establishing a departure record for himself and also for an inference from this fact that he must have been born in Hawaii.

The Appellee contends that the basis for the Appellant's claiming the departure record which he does, has been destroyed by Appellant's testimony in connection with the documentary evidence.

Defendant's Exhibit No. 6—This exhibit is the photograph of the original manifest of the Hong Kong Maru, leaving Honolulu *November 8, 1899*. The Appellant has attempted to attack this, and as a matter of fact, all manifests, on the ground that it is unreliable. There is no evidence to that effect whatsoever in the record. As a matter of fact, Mr. Choy, Archivist Clerk, testified that this had not been his experience—that he had not found them to be unreliable (R. 98, Tr. 45). He was in no way shaken in his testimony.

The manifest clearly shows, beginning on page 3 and ending on page 4, the entries claimed by the Appellant herein (R. 83, Tr. 30; R. 85, Tr. 32).

QUESTIONS PRESENTED.

1. Is a *prima facie* case a minimum quantity of evidence?
2. Were there eyewitnesses to Appellant's birth in Hawaii?
3. Was it error to admit the ship's manifest when Appellant had clearly claimed entries therefrom?

4. Inspector Schmolt's report—was it error not to admit it?

5. Should a new trial have been granted?

SUMMARY OF ARGUMENT.

This case is strictly a factual one depending on the credibility of the Appellant and the application of documentary evidence to the facts. Appellant has raised objections to the admission of certain documents all of which are without merit. He also challenges the holdings of this Court in *Mah Toi v. Brownell* (9 Cir. 1955), 219 F. (2d) 642, and *Louie Hoy Gay v. Dulles*, 248 F. (2d) 953, as to the strength of a *prima facie* case. All of the documents are admissible. The Court has found the statements of the Appellant to be completely unreliable and the *prima facie* case herein, if there be any, is very weak.

ARGUMENT.

I.

PRIMA FACIE CASE IS A MINIMUM AMOUNT OF PROOF.

The recent decisions of this Court, *Mah Toi v. Brownell* (9 Cir. 1955), 219 F. (2d) 642, and *Louie Hoy Gay v. Dulles*, 248 F. (2d) 953, held that *prima facie* cases are minimum quantities of proof necessary to sustain Appellant's case. Appellant depends on two things herein: (1) his testimony, which the Dis-

trict Court found to be not worthy of belief (R. 15, 39); (2) the *prima facie* case established by Appellee's admission (R. 39).

The next question to follow is: what does appellant's *prima facie* case consist of? It consists of (1) his testimony in 1923; (2) the testimony of two witnesses who do not purport to be eyewitnesses, and a departure record (R. 35). The Court has found the Appellant's statements to be completely unreliable (R. 15). The departure record which Appellant states is "wrongly chosen", and the testimony of *two witnesses*. The two witnesses have not testified as to specific circumstances as to this Appellant; as a matter of fact, all they say as to him is that he was born in Hawaii. This becomes the rankest kind of hearsay. It appears here that the *prima facie* case is a very bare minimum amount of proof. Further, Appellant has the burden of proving his case by a preponderance of the evidence.

It is apparently the law of this circuit that the defendant in this type of case has no extraordinary burden of proof. *Ly Shew v. Dulles* (9 Cir. 1954), 219 F. (2d) 413; *Mah Toi v. Brownell, supra*; and *Louie Hoy Gay v. Dulles, supra*. This is not the case of a person whose citizenship is being taken away in a denaturalization proceeding (*Baumgartner v. U. S.*, 332 U.S. 665), or whose citizenship is admitted except for alleged acts of expatriation. The real issue in this case is the Appellant's identity as a U. S. citizen. Appellee's evidence, together with the insubstantiality of Appellant's proof, reveals that the Trial Court

committed no error. That the evidence presented did not preponderate in favor of the Appellant.

II.

THERE WERE NO EYEWITNESSES TO APPELLANT'S BIRTH.

If there were eyewitnesses to Appellant's birth, wherever it may have taken place, none of them testified on behalf of Appellant (Plaintiff's Exhibit "A", R. 29-35). To carry this a little further, not one of the witnesses testified that he saw Appellant in Hawaii prior to his alleged departure (Plaintiff's Exhibit "A", R. 29-35).

III.

WAS IT ERROR TO ADMIT THE SHIP'S MANIFEST WHEN APPELLANT CLEARLY CLAIMED ENTRIES THEREFROM AS HIS?

On cross-examination, the Appellant testified as follows:

Q. Do you claim as your departure record, entries on the manifests of the SS Hong Kong Maru, leaving the Hawaiian Islands on November 8, 1899, of Leong How, Mrs. Leong How, child and infant?

A. Yes. (R. 83, Tr. 30.)

Certainly the manifest is material to show whether those entries so appear. Further, without deciding the questions of reliability of the manifest, Appellant has singled out a specific one as his own. As a matter of

fact, he seems to have claimed this departure record consistently (R. 35; R. 82, Tr. 29; defendant's Exhibit No. 1; R. 83, Tr. 30).

IV.

**IS INSPECTOR SCHMOLT'S LETTER MATERIAL
TO THIS MANIFEST?**

The letter, as read into the record, shows that it is immaterial to this case. First, the manifest itself does not bear any notations as set out therein. Secondly, the Appellant himself has selected this departure record and claims it. Whether other manifests might be unreliable, has no bearing here where Appellant has chosen specific items on this manifest. Further, the letter could only have been used for collateral impeachment of Mr. Choy for answers given by him on cross-examination.

V.

**WERE THE ADMISSIONS OF DEFENDANT'S EXHIBITS
2, 3, 4, 5, AND 7, ERROR?**

Appellee respectfully represents that he is unable to see any connection between the questions set out in Appellant's Brief (Br. 19) and the admission of Defendant's Exhibits 2, 3, 4, and 5, which were documentary evidence tending to show that the departure record claimed by Appellant did not belong to him. Exhibit 7 is a document or part thereof, kept in the regular course of business (R. 107, Tr. 54). There

was no objection to any of these documents at the time of their admission (R. 108, Tr. 55; R. 109, Tr. 56). All of the documents certainly are material to the departure record.

VI.

THE COURT DID NOT ERR IN REFUSING TO GRANT A NEW TRIAL.

The previous argument concerning the eyewitnesses' testimony is incorporated herein. The Court did not err in denying the motion for a new trial.

CONCLUSION.

The trial court did not err. The Appellant has failed to carry his burden of proof by a fair preponderance of the evidence.

Dated, Honolulu, T. H.,
July 8, 1958.

Respectfully submitted,

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